

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Maryann Wong	Team: Team # 2	CCRB Case #: 200816537	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Sunday, 11/16/2008 5:05 PM	Location of Incident: Ralph Avenue and Farragut Road	Precinct: 63	18 Mo. SOL 5/16/2010	EO SOL 5/16/2010	
Date/Time CV Reported Mon, 11/17/2008 9:21 AM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Mon, 11/17/2008 9:21 AM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Joshua Konen	00966	936882	PSA 1
2. POM Frank Chung	31398	940004	PSA 1

Officer(s)	Allegation	Investigator Recommendation
A.POM Joshua Konen	Abuse: Officer Joshua Konen questioned § 87(2)(b)	
B.POM Frank Chung	Abuse: Officer Frank Chung questioned § 87(2)(b)	
C.POM Joshua Konen	Abuse: Officer Joshua Konen frisked § 87(2)(b)	
D.POM Joshua Konen	Abuse: Officer Joshua Konen searched § 87(2)(b)	
§ 87(4-b), § 87(2)(g)		
§ 87(4-b), § 87(2)(g)		

Synopsis

On November 17, 2008, § 87(2)(b) filed a complaint with the CCRB via phone. § 87(2)(b) did not witness the incident.

On November 16, 2008, at approximately 5:05 PM, on the corner of Ralph Avenue and Farragut Road in Brooklyn, § 87(2)(b)'s son, § 87(2)(b) was questioned by Officer Joshua Konen and Officer Frank Chung (Allegations A and B). Officer Konen frisked and searched § 87(2)(b) (Allegations C and D) § 87(4-b), § 87(2)(g) § 87(2)(b) was not arrested and did not receive a summons.

On November 21, 2008, the CCRB offered mediation to § 87(2)(b) § 87(2)(b) did not accept because he did not want to see the officers in person.

Officer Konen and Officer Chung both testified that they questioned § 87(2)(b) because § 87(2)(b) had his right hand in his right jacket pocket, where there was a bulge. Officer Konen testified that § 87(2)(b) looked back at them two or three times. § 87(2)(b) testified that he was holding his jacket in the chest area. § 87(2)(g)

Officer Konen and Officer Chung testified that they frisked § 87(2)(b) because they observed a bulge in § 87(2)(b)'s right pocket that they believed could be a weapon. Officer Konen testified that the bulge looked "rectangular" and "could have been anything." § 87(2)(g)

Officer Konen denied searching § 87(2)(b) Officer Chung did not recall if Officer Konen searched § 87(2)(b) § 87(2)(g)

Summary of Complaint

§ 87(2)(b)
On November 17, 2008, § 87(2)(b)'s mother, § 87(2)(b) filed a complaint with the CCRB via phone. § 87(2)(b)'s statement was solely based on information provided by her son. On November 21, 2008, § 87(2)(b) was interviewed at the CCRB (encl. 4A-D). On April 15, 2009, the CCRB spoke with § 87(2)(b) via phone. § 87(2)(g) § 87(2)(b)

On November 16, 2008, at approximately 5:05 PM, in the vicinity of Ralph Avenue and Farragut Road in Brooklyn, § 87(2)(b) was returning from the barber shop. As § 87(2)(b) was crossing Ralph Avenue to the west side, his right hand was holding his jacket around his chest area to tighten his jacket from the cold wind. § 87(2)(b) was wearing a gray timberland jacket, which was not tight-fitting, and blue jeans and brown shoes. As he began walking north on Farragut Road, he was stopped by Officer Joshua Konen (operator) and Officer Frank Chung (recorder), who were driving a marked, white car. § 87(2)(b) identified Officer Konen by looking at the name on his uniform. Officer Chung was identified as Officer Konen's partner in the PSA 1 roll call on November 16, 2008. While still in the car, Officer Konen asked § 87(2)(b) to stop walking. § 87(2)(b) stopped walking. Officer Chung asked, "Do you know why we're stopping you?" § 87(2)(b) responded, "No." Both officers got out of the car.

Officer Konen asked § 87(2)(b) a couple questions about where he lived and where he was going. Immediately after the questioning, Officer Konen frisked the front of § 87(2)(b)'s body. He felt § 87(2)(b)'s cell phone on the right side of his waist. With both hands, Officer Konen lifted up § 87(2)(b)'s jacket to

look at the cell phone. § 87(2)(b)'s cell phone is black Sprint LG, three inches long and less than a quarter of an inch thick. Then Officer Konen unzipped § 87(2)(b)'s jacket and searched both inside jacket pockets. § 87(2)(b) had keys and a receipt in his right pocket.

Then Officer Chung asked § 87(2)(b) for his ID and § 87(2)(b) obliged. Officer Chung told § 87(2)(b) that they had pulled him over because there was current gang activity in the neighborhood and § 87(2)(b) had been holding his jacket. Then the two officers got in their car and drove away. The entire interaction lasted approximately seven minutes, during which § 87(2)(b) had a calm demeanor.

Results of Investigation

Identification of Officers Interviewed

§ 87(2)(b) identified Officer Joshua Konen by looking at the name on his uniform. Officer Frank Chung was identified as Officer Konen's partner in the roll call. In addition, the officers' CCRB statements confirmed their involvement in the incident.

Officer Interviews

Officer Joshua Konen

On February 18, 2009, Officer Joshua Konen was interviewed at the CCRB (encl.5A-E). Officer Konen is a white male, 5'11" tall, 200 lbs, age § 87(2)(b) with blonde hair and blue eyes.

On November 16, 2008, Officer Konen worked from 3:00 PM to 11:35 PM, was assigned to Sector E, worked with Officer Frank Chung, dressed in uniform and was assigned to marked RMP 9286 as the operator. Officer Konen did not make an entry in his memo book regarding this incident.

On November 16, 2008, at approximately 5:05 PM, Officer Konen and Officer Chung were driving out of a New York City Housing Authority driveway near Ralph Avenue and Farragut Road in Brooklyn. As they were pulling out of the driveway, they saw § 87(2)(b) walk across the front of their car; he was walking at a medium speed, and was about five feet away. The left side of § 87(2)(b)'s body was facing their car, but the officers could see the bulge, since § 87(2)(b)'s jacket pockets were in the front of his jacket. § 87(2)(b) was wearing a black jacket and khaki pants. His right hand was in his right pocket and it looked like he was holding something. This same pocket had a bulge. Officer Konen stated that "it looked like he was holding something in his right jacket pocket." Officer Konen stated that "in my training as a police officer, [the bulge] could have been a firearm; it could have been anything." Officer Konen said that the bulge looked "rectangulish" He further elaborated by saying that "[since the bulge was] on the inside of the jacket, I could not really tell [what it looked like]." In addition, § 87(2)(b) looked back at the officers twice, which was suspicious. Both officers agreed that the bulge could be a firearm and decided to stop § 87(2)(b).

§ 87(2)(b) crossed the street and the officers pulled up next to him on his left side. Officer Konen asked § 87(2)(b) to hold on for a second and both officers got out of the car. Officer Konen asked § 87(2)(b) where he was coming from and where he was going. § 87(2)(b) told him that he was coming from church and going to the barber's shop. § 87(2)(b)'s demeanor was calm and cooperative.

Then Officer Konen frisked the front of § 87(2)(b)'s jacket and felt a bulge on § 87(2)(b)'s right side. § 87(2)(b) pulled out his cell phone and showed it to Officer Konen. Officer Konen never searched § 87(2)(b)'s pockets. Then Officer Konen asked for § 87(2)(b)'s ID, returned it, and then left the scene with Officer Chung. The interaction lasted less than five minutes. The officers did not run a warrant check or fill out a stop-and-frisk report.

Officer Frank Chung

On January 20, 2009, Officer Frank Chung was interviewed at the CCRB (encl.6A-D). Officer Chung is an Asian male, 5'8" tall, 196 lbs, age § 87(2)(b) with black hair and brown eyes.

On November 16, 2008, Officer Chung worked from 3:00 PM to 11:35 PM, was assigned Sector E, worked with Officer Joshua Konen, dressed in uniform and was assigned to marked RMP 9286 as the recorder.

Officer Chung's memo book states the following: 5:00 PM, possible CPW (criminal possession of a weapon) – § 87(2)(b) DOB § 87(2)(b), stop-and-frisk report prepared.

On November 16, 2008, at approximately 5:00 PM, Officer Chung and Officer Konen were driving at 5 mph west on Ralph Avenue when they saw § 87(2)(b) walking along the park west on Ralph Avenue. The officers observed a bulge at § 87(2)(b)'s right hip, under his heavy jacket, and noticed that § 87(2)(b) had his hands in his pockets. § 87(2)(b) was walking on the left side of the police car. Officer Chung did not remember which officer observed § 87(2)(b) first. The officers thought that the bulge indicated a weapon and decided to stop § 87(2)(b) because that is the regular procedure.

Officer Konen approached § 87(2)(b) and asked him questions, including where he was coming from, where he was going and where he lived. § 87(2)(b) had a calm demeanor and answered their questions accordingly. Then Officer Konen frisked § 87(2)(b). Officer Chung did not recall if Officer Konen searched § 87(2)(b)'s pockets. § 87(2)(b) did not have a weapon. Then § 87(2)(b) was asked for his ID and the officers left. The interaction lasted approximately five minutes. Officer Chung prepared the 250 report; however, there is no record of a stop-and-frisk report for § 87(2)(b) on November 16, 2008.

Police Documents

PSA 1 Tour 3 Roll Call

The PSA 1 tour 3 roll call lists Officer Konen and Officer Chung as assigned to sector E on November 14, 2008 (encl. 8A).

UF 250

Officer Chung testified that he filled out a stop-and-frisk report for § 87(2)(b) however, there is no record of a stop-and-frisk report for § 87(2)(b) on November 16, 2008 (encl. 7A).

Criminal Conviction History

Searches conducted in BADS and OCA show that § 87(2)(b) has no criminal convictions in his arrest history.

CCRB History

Officer Joshua Konen

Officer Konen, a member of the NYPD for four years, has no substantiated allegations on his history (encl. 2A).

Officer Frank Chung

Officer Chung, a member of the NYPD for three years, has no substantiated allegations on his history (encl. 2B).

§ 87(2)(b)

§ 87(2)(b) has no current or past complaints at the CCRB (encl. 2C).

Conclusions and Recommendations

Subject Officer Identification

§ 87(2)(b) identified Officer Joshua Konen by looking at the name on his uniform. Officer Frank Chung was identified as Officer Konen's partner in the PSA 1 roll call. In addition, both officers fit the physical description § 87(2)(b) gave of the officers who allegedly stopped him: a white male and an Asian male. § 87(2)(b) identified the officer who frisked him as a white male with the last name "Konen." Officer Konen and Officer Chung both testified that Officer Konen frisked § 87(2)(b).

Undisputed facts

It is not in dispute that Officer Konen and Officer Frank Chung approached § 87(2)(b) and asked him non-accusatory questions. It is not in dispute that Officer Konen frisked § 87(2)(b).

Disputed facts

At issue is the placement of § 87(2)(b)'s right hand as he passed the officers. Also in dispute is whether Officer Konen searched § 87(2)(b).

Assessment of the evidence

Officer Konen testified that he saw § 87(2)(b) with his right hand in his pocket, where there was a bulge, and that § 87(2)(b) looked back at the officers two or three times, prompting the officers to stop him. According to the New York Court of Appeals (encl. 1A) a level-one encounter is justified if the officer has “any articulable reason to approach.” Suspicion of criminality is not required. § 87(2)(b) testified that he was holding his jacket in the chest area, while Officer Konen alleged that § 87(2)(b) had his hand in his right pocket, where there was a bulge. § 87(2)(g)

§ 87(2)(g) People v. Powell, 246 A.D.2d 366 (1st Dept. 1998), is instructive to the investigation’s legal analysis. The defendant in Powell was observed wearing a waist length jacket, walking briskly in a high-crime area, holding one arm stiffly by his side and adjusting the right side of his waistband. The court held that these observations were sufficient to ask him level-one questions – his identity, destination, and why he was in the area. However, the officer’s subsequent frisk of defendant “just for my safety and to make sure he didn’t have anything” was ruled unlawful, because the observations justifying a level-one encounter did not give the officers reasonable suspicion that Mr. Powell was armed. See also People v. Wells, 226 A.D.2d 406 (2d Dept. 1996)(police, having observed defendant adjusting an object in his waist area and pulling the jacket down over it, were justified in asking where he was coming from and where he was going). All parties testified that Officer Konen asked § 87(2)(b) questions concerning his name, address and presence at the location, § 87(2)(g)

All parties testified that § 87(2)(b) was frisked by Officer Konen. As Barry Kamins explains in *New York Search and Seizure* (encl.1C), in order to frisk an individual, a police officer needs to have reasonable suspicion that said individual has committed or is committing a crime or presents a danger to the officer’s safety. Officer Konen and Officer Chung alleged that § 87(2)(b) had a bulge in his right pocket, with his hand inside his pocket. Officer Konen testified that the bulge looked “rectangular” and “could have been anything.” § 87(2)(g)

According to Kamins (encl. 1J), if a police officer sees a suspicious bulge in a jacket pocket, a frisk is not permitted (absent additional circumstances) unless the bulge appears to be the outline of a gun. A frisk will be permitted if the defendant fits a description of a person with a gun, if the defendant has committed a violent crime, or if the totality of circumstances places the officer in personal danger. § 87(2)(g)

Finally, § 87(2)(b) claimed that Officer Konen searched him. Officer Konen, however, testified that he did not search § 87(2)(b). Officer Chung did not recall if Officer Konen searched § 87(2)(b). § 87(2)(g)

Allegation A: Officer Joshua Konen questioned § 87(2)(b)

Allegation B: Officer Frank Chung questioned § 87(2)(b)

§ 87(2)(g)

Allegation C: Officer Joshua Konen frisked § 87(2)(b)

§ 87(2)(g)

Allegation D: Officer Joshua Konen searched § 87(2)(b)

§ 87(2)(g)

Investigator: Maryann Wong

Date:

Supervisor:

Date:

Reviewed by:

Date:

Reviewed by:

Date: